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ABSTRACT

In Goss v. Lopez and Wood v. Strickland, the U.S. Supreme Court spelled out what due process means as it applies to suspension and expulsion of public school students. In Goss v. Lopez, the Court decided that a student who is suspended for up to ten days without a hearing is entitled to due process of law: "students . . . must be given some kind of notice and afforded some kind of hearing . . . . In most cases, the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred." The Court also emphasized that "longer suspensions or expulsions . . . may require more formal procedures." In Wood v. Strickland, the Court ruled that, although school board members are entitled to a "qualified" privilege against damages for wrongful acts committed while acting in good faith, they are not protected against damages if they knew, or reasonably should have known, that their actions would violtate the constitutional rights of a student. However, the Court stressed that a mere mistake in carrying out his duties should not make a board member liable. Furthermore, the Court stated, "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." (Author/JG)

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A Legal Memorandum

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STUDENT DISCIPLINE
SUSPENSION and EXPULSION

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In January, and again in February 1975, the U.S. Supreme Court spelled out what it means by due process of law as it applies to suspension and expulsion of public school students. Of course, most school systems had been providing some aspects of due process to their students for many years, but the Court's new holdings present the first actual requirements laid down by the nation's highest court for handling student discipline cases. If principals are to avoid the very real spectre of monetary damages where their actions deprive the student of civil rights, it is important for them to be familiar with the requirements and to establish procedures that meet them.

Suspension: *Goss v. Lopez* [1]

What is the maximum amount of time that a principal may suspend a pupil from school without a hearing? Most of the states have dealt with this problem by statutes allowing "school officials" to suspend pupils for up to five or 10 days without such guarantees. The state of Ohio had such a statute in 1971 when student protests in Columbus resulted in numerous suspensions without benefit of a hearing. During Black History Week, high school students clashed with administrators over which community leaders should be allowed to speak at school assemblies. Polarization quickly deteriorated into disturbance, and disturbance into mass suspensions. Nine of the students brought suit in federal court. The Supreme Court, by a split 5-4 vote, indicated that the civil rights of the students had been violated by school officials, even though they were acting within the 10-day limit set by the Ohio statute. (The Court, among other things, declared the Ohio statute unconstitutional.)

Mr. Justice White wrote the majority opinion in which Justices Douglas, Brennan, Stewart, and Marshall joined. In order for the plaintiffs to win, they had to show that the opportunity to attend school was either a "liberty" or a "property" interest protected by the 14th amendment to the Constitution, and that the state, through its statute and action of public officials, had deprived them of such an interest without due process of law.

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1 Opinion No. 73-898, decided January 22, 1975, 95 S.C. 729

While being careful not to contradict its holding in the *Rodriguez*[2] case that education was not a specific right under the U.S. Constitution, the Court maintained that it could be a property interest protected by the Constitution. Wrote Justice White in part:

> The 14th amendment forbids the state to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. (Citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 1972).

The Court went on:

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend.

Citing the *Tinker*[3] case admonition that young people do not "shed their constitutional rights at the schoolhouse gate," Justice White wrote that Ohio must recognize a student's legitimate entitlement to a public education as a "property interest" which falls within the protection of the Due Process Clause. This interest "may not be taken away for misconduct without adherence to the minimum procedures required by that Clause," the opinion declared.

Liberty, too, is protected by the Due Process Clause. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," he has recourse to the 14th amendment's protections. If charges of misconduct are sustained and recorded, those charges could seriously damage the student's standing with his fellow pupils and teachers as well as interfere with later opportunities for higher education and employment. The state has set itself up to determine unilaterally and without process whether that misconduct has occurred. Such state action collides immediately with the requirements of the Constitution.

Minimum Procedures

Having decided that a student who is suspended for up to 10 days without a hearing is entitled to due process of law, the majority then turned its attention to what is meant by "minimum procedures." Justice White on this point wrote:

> If the suspension is for 10 days, [this] is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

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2 *Rodriguez v. San Antonio Independent School District*, 406 U.S. 1 (1973)
3 *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," White said, which is tantamount to saying that each case must be decided on its own set of circumstances. While the Court ordinarily does not spell out a standardized procedure, it is surprisingly specific in this case:

> At the very mimumum, therefore, students facing suspension and the consequent interferences with a protected property interest must be given some kind of notice and afforded some kind of hearing. [Emphasis, the Court's.].... The student must be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. There need be no delay between the time "notice" is given and the time of the hearing. In most cases, the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold...that the student first be told what he is accused of doing and what the basis of the accusation is.

The majority went on to say, however, that there may be situations in which prior notice and hearing cannot be mandated. Those students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. But in those cases, the necessary notice and "rudimentary hearing" should follow as soon as practicable." And the more serious the charge, the more careful must the principal be in seeing that fundamental fairness is present at every step of the procedure.

The majority stopped short of insisting that the student must be given, as a matter of due process, the opportunity to secure counsel, to confront and cross-examine witnesses, or to call his own witnesses to verify his version of the incident.

> To impose in each case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as part of the teaching process.

On the other hand, the Court noted that requiring the principal to permit the student to tell his side of the story, "will provide a meaningful hedge against erroneous action. At least, the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect," thus reducing the chance of error.

The Court emphasized that its opinion here applied only to the short suspension, not exceeding 10 days. "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Finally, the Court added, "there may even be situations involving only a suspension where the student is entitled to more than the rudimentary procedures outlined in this case."

Expulsion: *Wood v. Strickland* [4]

Approximately 30 days after the *Goss* decision, the Supreme Court ruled on an expulsion case. Because of the way in which the issues were presented to the Court, however, the question of what procedures were due the pupils involved was not discussed. The decision therefore throws little light on what the Court believes due process demands in a case of expulsion or long-term suspension. Three female students, all sophomores 16 years of age, admitted mixing three bottles of 3.2 beer into a soda pop punch, bringing it to a school function, and serving the mixture, apparently without noticeable effect, to parents and teachers. By calculation, the punch contained no more than 0.91 percent alcohol, which plaintiffs claimed was insufficient to constitute a violation of the board's rule against serving an "intoxicating" beverage at school functions. The board did not try to prove that it was indeed "intoxicating," contending instead that it had meant to place its prohibition on alcoholic beverages all along, and that everyone including the plaintiffs knew it.

When rumors spread that the punch had been spiked by the plaintiffs, they were called in for discussion and confessed what they had done. The board subsequently held a meeting to which neither the students nor their parents were invited, and, despite a plea for clemency by the principal, the board decided to suspend the offenders for the remainder of the year, a period of three months. At a second meeting two weeks later, at which the students were represented, the board refused to relent because their rule prescribed a mandatory expulsion for the offense. The original sentence was imposed, whereupon the students brought an action to block the board's decision. Later, the petition was amended to include financial damages against the board members as individuals under the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983).

The District Court originally favored the school board on the grounds that the board members were immune from damages, but the Court of Appeals reversed, and also held that the board's failure to present any evidence that the punch was in fact "intoxicating" was a violation of the plaintiff's constitutional rights.

The case presented two issues to the Supreme Court: (1) Are school officials immune from liability for damages under Sec. 1983 without proof of malice on their part? (2) Do federal courts have the right to re-examine evidentiary questions arising in school disciplinary questions, or the proper construction of school regulations?

Liability of School Officials

The Act in question was originally enacted by Congress to prevent racial discrimination after the Civil War. It provides that any person who, while acting in an official capacity, deprives another of his civil rights may be held liable in damages for such deprivation, or that the courts will recognize any other appropriate relief.

In the past few years, the Act has been widely invoked not only by pupils but also by teachers seeking injunctive relief against school boards, as in cases for reinstatement after suspension. There has been considerable disagreement, however, whether public officials can be held personally liable for damages unless it is proven that their action was based on malicious intent.

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4 Opinion No. 73-1285, decided February 25, 1975, 95 S.C. 992

By a bare 5-4 majority, the Supreme Court decided that a showing of malice was not always required. Ignorance of what a student's constitutional rights are will not always serve as a defense in such cases, said the majority opinion, again written by Mr. Justice White. School officials are entitled to a "qualified" privilege against damages for wrongful acts while acting in good faith. However, school board members will not be considered absolutely immune to such payment if they knew, or reasonably should have known, that the actions they took would violate the constitutional rights of a student, just as if they took the action with the malicious intention to cause a deprivation of some right to which the student was entitled.

The school board member who has "voluntarily" undertaken the task of supervising the operation of the school must be held to a "standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."

The Court tried, however, to make clear that a mere mistake in carrying out his duties should not make the board member liable. They are not..."charged with predicting the future course of constitutional law. A compensatory damages award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Scope of Judicial Review

"Scope of judicial review" may seem like a technical legal matter, and perhaps for this reason was largely ignored in reports by the general communications media. Simply put, it just means the degree to which courts are supposed to second-guess administrative decisions. And, in this case, it may have been as important to principals and other educators as the decision on money damages. On the specific point involved, the Supreme Court ruled unanimously that the Court of Appeals was wrong to conclude that the school's regulation prohibiting the use or possession of intoxicating beverages could not be interpreted as it was by the board. More importantly, given the fact that there was evidence supporting the charge against the students, the Court of Appeals should not even have interfered. Speaking for the entire Court on this point, Justice White was very clear:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. But Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Conclusion

The *Goss* and *Wood* cases discussed in this Legal Memorandum may have far-reaching implications for principals and other educational administrators concerned with the regulation of student conduct. As darkly perceived by Justice Powell in his dissenting opinion in *Goss*:

> No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process.

On the other hand, the majority placed numerous conditions upon its requirements of minimal due process, and took great pains to make clear their intention of avoiding formal administrative procedures which would seriously hinder the school in the pursuit of its educational purposes.

In *Wood*, similarly, it is easy to share the forebodings of Justice Powell, again in dissent, on the Court's holding that school officials may be held liable for financial damages if they deprive a pupil of constitutional rights, even if it was done without malice, but only with some degree of recklessness. As Powell says in the last paragraph of his opinion:

> In view of today's decision significantly enhancing the possibility of personal liability, one must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education.

It should be noted, however, that this holding is also conditional. Board members are not to be held responsible for every innocent mistake. Moreover, the liability for damages assigned to board members by *Wood* has already been held to apply to principals and teachers, who are never accorded immunity as public officials. To the extent, therefore, that the *Wood* case makes school boards more cautious in the adoption of regulations which principals must administer--it may help keep principals out of court!

Recommendations

1. Expulsion or Long-Term Suspensions

The state law or board regulations are usually quite specific in what is required by way of due process; indeed in all of the states, only the board itself can expel a pupil. In absence of clear statutory or administrative requirements, it is best to accord at least the following:

a) written notice of the rules violated, the intention to expel, and the place, time, and circumstances of the hearing with sufficient time provided to prepare a defense

b) full and fair hearing before an impartial adjudicator (not the person who collected the evidence)

c) right to legal counsel or some other adult representation

d) opportunity to present witnesses or evidence in the accused pupil's behalf, and to cross-examine opposing witnesses

e) some kind of written record (not necessarily verbatim) demonstrating that the decision was based on the evidence

2. Short-term Suspensions

If nothing more is prescribed by statute or regulation, the Goss decision requires before actual suspension:

a) oral or written notification of the nature of the violation and the intended punishment

b) "discussion" with the disciplinarian providing the pupil with an opportunity to tell his side of the story

c) if the student denies the violation, an explanation of the evidence of the violation upon which the disciplinarian is relying. (The interview may follow by minutes the act which caused the reaction on the part of the school official.)

3. Financial Liability

To avoid financial liability under the Civil Rights Act of 1871 (usually referred to as Section 1983 of Title 42 of the U.S. Code):

a) make and enforce any rule which appears to abridge civil rights only after careful consideration. If at all possible, get the advice of counsel

b) if a rule or its enforcement appears to abridge a pupil's civil rights, be certain that it is necessary, reasonably related to the schools purposes, and administered without discrimination.

c) set up fundamentally fair disciplinary procedures which meet the standards for suspension and expulsion described above

d) make a reasonable attempt to keep up with court decisions governing student conduct in your jurisdiction.

This Legal Memorandum is based in large part upon an article by M. Chester Nolte, Chairman, Educational Administration, University of Denver, and President of the National Organization on Legal Problems of Education (NOLPE).

Insurance: Another Source of Protection

While everyone wants to avoid even the threat of financial liability resulting from legal challenge, no educational administrator can be guaranteed that he will not be sued for some action he has taken. It is for this reason that NASSP makes professional liability insurance automatically available to all of its members. It provides protection not only for damages up to $300,000, but also reimbursement of reasonable legal expenses incurred in defense. In some cases additional protection may be provided through school district or state association policies as well.

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